# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM 1940

## No. 678

THE BALTIMORE AND OHIO RAILROAD COMPANY,
PETITIONER,

vs.

FREDERICK S. KEPNER

PETITION FOR CERTIORARI FILED JANUARY 6, 1941.

CERTIORARI GRANTED FEBRUARY 10, 1941.

# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1940

# No. 678

THE BALTIMORE AND OHIO RAILROAD COMPANY, PETITIONER,

*vs.*

FREDERICK S. KEPNER

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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[fol. 1]

# IN THE COURT OF COMMON PLEAS, HAMILTON COUNTY, OHIO

THE BALTIMORE & OHIO RAILROAD COMPANY, a Corporation, Baltimore, Maryland, Plaintiff,

vs.

FREDERICK S. KEPNER, 405 Lombardy Street, Elmwood Place, Hamilton County, Ohio, Defendant

[No. A-69867]

PETITION—Filed January 25, 1940

(1) Now comes The Baltimore & Ohio Railroad Company, plaintiff herein, and says that it is a corporation duly organized and existing under and by virtue of the laws of the state of Maryland and having its principal office in the city of Baltimore, Maryland; that the defendant, Frederick S. Kepner, is a resident of the village of Elmwood Place located in Hamilton county, Ohio.

(2) Plaintiff further says that the defendant, Frederick S. Kepner, on the eighteenth day of May, 1939, was employed by it as a brakeman, and while on duty in such capacity was on said date involved in an accident as a result of which he received certain personal injuries.

(3) Defendant, at the time of receiving said injuries while employed by this plaintiff was a resident of Hamilton [fol. 2] county, Ohio; and that the place where said injuries were received was East Middletown, Butler county, Ohio, which said county joins Hamilton county at the northerly boundary thereof.

(4) Plaintiff further says that at all times since the occurrence of the accident resulting in the said injuries to the defendant it has operated a part of its railroad system in and through Hamilton and Butler counties, Ohio, and has had numerous agents in its employ in said counties; that in each of the said counties Courts of Common Pleas have been in constant session and the defendant had full and complete opportunity to file any action desired by him for any relief to which he was entitled in the Common Pleas

Court of either of said counties; and that at all times the United States District Court for the Southern District of Ohio, Western Division, has been in constant session and the defendant had full and complete opportunity to file any action desired by him for any relief to which he was entitled in the said United States District Court; that service of process could have been had upon this plaintiff in any of the said courts and service of process was available to enforce the attendance of witnesses to the said incident in all of the said courts.

(5) Plaintiff further says that sometime following the accident hereinbefore referred to defendant employed Morris S. Borden and Samuel T. Gaines, practicing law as partners under the name and style of Borden & Gaines, with offices at 205 National City Bank Building, Cleveland, Ohio, to represent him as counsel in prosecuting his claimed right [fol. 3] of action against this plaintiff; that said attorneys are engaged in the general practice of law in the city of Cleveland, ordinarily engaged in the practice in the United States District Court and the Common Pleas Courts of the state of Ohio.

(6) Plaintiff further says that the defendant has failed to avail himself of the court facilities immediately available within a reasonable distance of the residence of any and all of the witnesses necessary for the trial of any cause of action to which the defendant may be entitled, but that by agreement and conspiracy among defendant and his counsel, has proceeded to file suit based upon the incident hereinbefore referred to which resulted in injuries to the defendant at East Middletown, Ohio, on May 18, 1939, in the United States District Court for the Eastern District of New York in a civil case numbered 763, a copy of which said complaint is attached hereto and made a part hereof to which reference is made for more specific statements with respect to the allegations of the defendant, Frederick S. Kepner.

(7) Plaintiff further says that the situs of the court in which the said action has been filed by the defendant is located more than seven hundred miles from the residence of the said defendant and the residence of the numerous witnesses that will be necessary for the trial of the issues raised in said action; that for the trial of the said case it

will be necessary to transport a distance of more than seven hundred miles approximately twenty-five witnesses consisting of the crew of this plaintiff company who were employed [fol. 4] with the defendant at the time of the said accident together with numerous physicians, surgeons, radiologists, hospital attendants and others who gave him medical attention or who have heretofore examined him, and numerous other railroad employees who inspected the premises following the said accident, inspected the equipment involved, and numerous other non-employee witnesses who will testify as to various essential elements of the accident.

(8) Plaintiff further says that the United States District Court for the Eastern District of New York assigns cases for trial numerically, by terms, and that it is impossible to ascertain a definite time of trial, and that in order to protect its interest and be ready for trial of the said case it will be necessary to provide for all of the numerous witnesses hereinbefore mentioned to be in New York several days prior to the probable date of trial and to be maintained there for all of the said period, in addition to the time necessary for said trial, and that the actual cash cost to this plaintiff of the said cause of action in New York will exceed, by at least four thousand ($4,000) dollars, the cost of the trial of the same issues in a court located near the residence of the defendant.

(9) Plaintiff further says that the trial of the said cause of action in the city of New York deprives this plaintiff of the immediate availability of witnesses; that if it should develop in the course of the said trial that other and additional witnesses are necessary, it will not be possible to arrange for the availability of such witnesses in the city of New York because of the distant location of the said court, [fol. 5] and that, in addition thereto, it will be totally deprived of its right of legal process to force the attendance of witnesses at the said trial, which said right of legal process plaintiff has if said suit were filed either in Butler county or Hamilton county, Ohio, or in the United States District Court for the Southern District of Ohio, Western Division.

(10) This plaintiff further says that the continued prosecution of the said case in the United States District Court for the Eastern District of New York, filed by this defendant, will force this plaintiff to depend upon depositions for the trial of the said case and that it is generally recognized

and the court will take judicial notice of the fact that depositions do not effectively present to the court and jury the facts involved in the issues being tried, and that, as a result thereof, plaintiff will be deprived from presenting the witnesses in person before the court and jury.

(11) Plaintiff further says that the trial of the action in the city of New York will deprive it of the right to present the necessary rebuttal evidence in the trial of the issues involved because of the lack of the right of legal process to force the attendance of witnesses and the impossibility of arranging for their presence in New York within time to be available for rebuttal testimony.

(12) Plaintiff further says that the facts as hereinbefore set forth establish that the continued prosecution by the defendant of his action in the United States District Court for the Eastern District of New York, or in any other distant jurisdiction, will constitute an undue burden on inter-[fol. 6] state commerce, will be unreasonable, improper and inequitable burden upon this plaintiff and that such unreasonable and inequitable proceeding will result in no benefit to the defendant, Frederick S. Kepner.

(13) Plaintiff further believes and therefore alleges that the defendant herein has conspired with his attorneys of Cleveland, Ohio, to bring the said action at a distant point for the purpose of annoying, harassing and vexing the plaintiff herein and without a sound and proper purpose of reasonably prosecuting any right of action that defendant may have against this plaintiff.

Wherefore, plaintiff, The Baltimore & Ohio Railroad Company, prays that the court may fix a date for hearing of an application for a temporary injunction, enjoining and restraining the defendant, Frederick S. Kepner, from further prosecuting the said cause of action against this plaintiff in the United States District Court for the Eastern District of New York, and from commencing and prosecuting any other action in said court, or in any court of said state, or at any other distant point, against this plaintiff which is or shall be based upon the cause of action hereinbefore referred to, and that, upon final hearing, the said temporary injunction be made permanent, and for such

other and further equitable relief to which this plaintiff may be entitled.

Waite, Schindel & Bayless, Herbert Shaffer, Philip J. Schneider, Attorneys for Plaintiff.

[Duly verified.]

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[fol. 7] United States District Court, Eastern District of New York

No. 763—Fred S. Kepner, Plaintiff, against The Baltimore & Ohio Railroad Company, a Corporation, Defendant.

Complaint

I. Plaintiff says that the defendant is a steam railroad corporation, owning and operating in interstate commerce a railroad in connection with the operation of which the defendant, at the time of the commencement of this action, is doing business in the Eastern District of New York.

II. The trackage of this defendant company extends in and through East Middletown, Ohio. At the time of the happening herein complained of both this plaintiff and this defendant were engaged in interstate commerce, by reason whereof this action arises under and by virtue of the Federal Employers' Liability Act of April 22, 1908 (C-149, Title 45, Sections 51-57, U. S. Code), together with the amendments thereto; that the amount involved herein exceeds, exclusive of interest and costs, the sum of three thousand dollars ($3,000.00); wherefore this action is brought in this court.

III. Plaintiff says further that on or about the eighteenth day of May, 1939, and for a long time prior thereto, he was in the employ of this defendant; that on said eighteenth day of May, he was engaged in work in said East Middletown, Ohio, as a brakeman for this defendant company; that while so engaged in pursuit of the duty he owed to this defendant, [fol. 8] he was riding on the top of a box car when suddenly and without any warning he was caused to be struck by a water spout, attached to and forming a part of a water tank owned, operated and maintained by this defendant company, as a direct result of the negligence and carelessness of

the defendant in the construction, maintenance and use of said water tank, spout and appurtenant parts.

IV. Plaintiff says further that at the time of the happening herein complained of he was a man of the age of 49 years, earning and able to earn approximately two hundred fifty dollars ($250.00) per month; that as a direct result of the negligence and carelessness of the defendant, he was caused serious, severe and disabling injuries to his person and body, which injuries are more particularly described as follows, to wit: causing this plaintiff to sustain a compression fracture of the first lumbar vertebra, with serious involvement of the spinal cord, resulting in serious damage to normal bowel and bladder function; causing plaintiff to sustain internal injuries; causing a complete anesthesia in the saddle zone involving the entire genital organ up to the pubic eminence; causing an anesthesia which extends into the perineum, buttocks, anterior pubis and scrotum, with areas of hypesthesia in both lower limbs; causing tenderness and pain over the lumbar region, with serious injury to the muscles, nerves, ligaments, tendons, vessels, cartilage and soft structures in the region of the fractured vertebra which was compressed with encroachment posteriorly on the intraspinal space; causing plaintiff serious injury to his sexual potency; severe shock to his entire nervous system; [fol. 9] causing plaintiff injury to the left index finger; various bruises and contusions about the body generally; that he has been caused some limitation in motion of the entire spine; great pain and suffering which will with reasonable certainty continue in the future and plaintiff believes and therefore avers that his injuries, with reasonable certainty, are permanent in character; plaintiff says that he was confined for approximately 17 weeks in a hospital, practically all of which time he was compelled to lie immobile upon a fracture bed; that the nature of his injuries are such as to require continual nursing care and attention, and plaintiff believes and therefore avers that such continual care and attention will with reasonable certainty be required in the future; plaintiff says farther that as a direct result of the happening herein complained of, he has been unable to pursue his employment in railroad work, and plaintiff believes and therefore avers that his injuries are such as will, with reasonable certainty, permanently incapacitate him in his ability to work and earn monies;

that in the care and treatment of the said injuries, he will caused medical expenses, the exact amount of which plaintiff at this time is unable to state.

Wherefore, plaintiff demands judgment against this defendant in the sum of one hundred twenty-five thousand dollars ($125,000.00), together with the costs of this action.

(Sgd.) Borden & Gaines, by William Samuels, Attorneys for Plaintiff.

[Verification attached.]

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[fol. 10] In Court of Common Pleas of Hamilton County

Demurrer—Filed March 8, 1940

Defendant demurs to the petition, for the reason that:

(1) The petition does not state facts which show a cause of action.

(2) That the court has no jurisdiction of the subject of the action.

Respectfully submitted, Edward M. Baillard, George Metzger, Borden & Gaines, Attorneys for Defendant.

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In Court of Common Pleas of Hamilton County

## Transcript of Docket and Journal Entries

1940, January 24. Petition and pr-ecipe filed and summons issued.

1940, January 25. Entry setting hearing for January 31, 1940, at 10 o'clock a. m. and sheriff of Hamilton county to notify defendant for hearing on application for temporary restraining order.

Upon application of The Baltimore & Ohio Railroad Company, plaintiff, it is ordered that the hearing on the petition for temporary injunction enjoining and restraining the defendant, Frederick S. Kepner, from prosecuting a cause of action against The Baltimore & Ohio Railroad Company in the United States District Court for the Eastern District of New York, is hereby set for hearing on the thirty-first day of January, 1940, at 10 o'clock a. m.

[fol. 11] It is further ordered that the sheriff of Hamilton county be and he hereby is commanded to notify the defendant, Frederick S. Kepner, of said date and time for hearing on the application for a temporary restraining order.

1940, January 25. Brief of plaintiff filed.

1940, January 25. Affidavit of Paul C. Garrott filed.

1940, January 25. Affidavit of E. L. Williams filed.

1940, February 5. Summons returned endorsed: Received by Fred Sperber, sheriff, Hamilton county, Ohio, January 25, 1940, at 11:40 a. m.

Cincinnati, Ohio, January 25, 1940.

Served the within named defendant, Frederick S. Kepner, by and through William Brownfield, my duly authorized and acting deputy sheriff, by delivering to him personally a true copy of this writ with all the endorsements thereon. Sheriff fees: $1.71. Fred Sperber, sheriff, Hamilton county, Ohio. By Raymond Kies, deputy.

1940, February 23. Petition to remove to U. S. District Court filed.

1940, February 23. Notice of removal filed.

1940, February 23. Bond of $3,000.00 given for removal.

1940, February 23. Order removing cause to U. S. District Court.

This case coming on to be heard upon the petition and bond of the defendant, Frederick S. Kepner, for an order removing this case to the District Court of the United States for the Southern District of Ohio, Western Division, and it appearing to the court that said defendant, Frederick [fol. 12] S. Kepner, has filed his said petition for said removal of said cause in due form, and that the said petition is sufficient in law; and that said defendant, Frederick S. Kepner, has also filed his bond herein, duly conditioned according to law, with good and sufficient surety thereon; and that said defendant has given due and legal notice to the plaintiff of his intention to file its said petition and bond, and of the time and place of filing the same, and also of this application for an order of removal; and it appearing to the court that this is a proper cause for removal to said District Court of the United States for the Southern District of Ohio, Western Division;

It is therefore, ordered, adjudged and decreed, that the said petition and bond be, and they are, hereby accepted and the said bond is hereby approved by the court; and that this

cause be, and it is, hereby ordered removed to the District Court of the United States for the Southern District of Ohio, Western Division; and that a copy of the record in this cause be prepared and duly certified by the clerk of this court for filing, and that it be filed in said District Court of the United States for the Southern District of Ohio, Western Division, within thirty (30) days from the date of the filing herein of said petition and bond, pursuant to law.

1940, February 23. Leave given to file motion to set aside order removing cause.

1940, February 23. Motion filed.

1940, February 24. Entry Setting Aside Order of Removal.

[fol. 13] This day this cause came on to be heard on the motion of plaintiff, The Baltimore & Ohio Railroad Company, to set aside the order removing this cause to the United States District Court for the Southern District of Ohio, Western Division, and the evidence, the arguments of counsel and was submitted to the court.

Upon consideration whereof and without passing on the merits of defendant's right to remove said cause, the court finds the same to be well taken and hereby grants the same, on the ground that the hearing on the merits of the petition to remove should be heard by Judge Ryan.

Wherefore it is considered, ordered and decreed that the motion of plaintiff to set aside the order removing said cause as aforesaid be and the same hereby is set aside.

To all of which the defendant excepts.

1940, March 5. Application to fix bond filed.

1940, March 6. Entry Denying Petition to Remove.

This day this cause came on to be heard on the petition of defendant, Frederick S. Kepner, praying that the within proceeding be removed to the United States District Court, Southern District of Ohio, Western Division, and the evidence and arguments of counsel and was submitted to the court.

Upon consideration whereof the court finds that this court is not required to surrender its jurisdiction until it has been clearly shown that the petitioner has a right to remove, and has the right to determine whether this cause is removable under the Federal statute. The court further

finds that the defendant is a resident of the state of Ohio [fol. 14] and has failed to establish his right to remove this cause and that this case does not come within the purview of the Federal Employers' Liability Act, and that if it did, then removal could not be had by reason of the provisions of the Federal statutes.

Wherefore, it is considered, ordered and decreed that the prayer of the petition to remove this cause to the United States District Court, Southern District of Ohio, Western Division, be and the same hereby is denied.

To all of which defendant excepts.

1940, March 8. Demurrer filed.

1940, March 8. Motion to dissolve injunction filed.

1940, March 7. Entry Granting Temporary Restraining Order. Order Issued to Sheriff of Hamilton County.

This day this cause came on to be heard on the application of the plaintiff, The Baltimore & Ohio Railroad Company, to grant a temporary injunction enjoining and restraining the defendant, Frederick S. Kepner, from further prosecuting his cause of action against The Baltimore & Ohio Railroad Company in the United States District Court for the Eastern District of New York, and from commencing and prosecuting any other action in said court or in any court of said state or at any other distant point against said The Baltimore & Ohio Railroad Company which is or shall be based upon the cause of action referred to in the petition in this cause, and the evidence and arguments of counsel, and was submitted to the court.

Upon consideration whereof the court finds that in view of the great importance of the subject-matter involved and [fol. 15] the seeming conflict of the authorities on the questions involved, a temporary restraining order should be issued in accordance with the prayer of the petition in order that the matters in controversy be held in status quo until the issues be presented in the pleadings so that this cause be fully heard on its merits.

Wherefore, it is considered, ordered and decreed that the application for temporary restraining order as prayed for in the petition be and the same is hereby granted, and upon the plaintiff giving an undertaking according to law in the sum hereinafter to be fixed by the court, the defendant, Frederick S. Kepner, is temporarily enjoined and re-

strained from further prosecuting his cause of action against The Baltimore & Ohio Railroad Company in the United States District Court for the Eastern District of New York, and from commencing and prosecuting any other action in said court or in any other court of said state or at any other distant point against said The Baltimore & Ohio Railroad Company which is or shall be based upon the cause of action referred to in the petition in this cause praying for said injunction. To all of which the defendant excepts.

1940, March 7. Order Fixing Bond in the Sum of $5,000.00.

This day this cause came on to be heard on the application of plaintiff, The Baltimore & Ohio Railroad Company, to fix the bond to be filed herein on the temporary restraining order heretofore granted, and the evidence and arguments of counsel, and was submitted to the court.

[fol. 16] Upon consideration whereof, the court finds that the plaintiff, The Baltimore & Ohio Railroad Company, should be required to furnish good and sufficient bond in the sum of $5,000.00.

Wherefore, it is considered, ordered and decreed that The Baltimore & Ohio Railroad Company, plaintiff herein, be and it hereby is ordered to furnish good and sufficient bond to the approval of the clerk in the sum of $5,000.00.

1940, March 7. Injunction Bond No. 232 in Book No. 29 in the sum of $5,000.00 given.

1940, March 11. Order of injunction returned endorsed: Received by Fred Sperber, sheriff, Hamilton county, Ohio, March 7, 1940, 12:25 p. m.

Cincinnati, Ohio, March 7, 1940.

Served the within named Frederick S. Kepner by and through William Brownfield, my duly authorized and acting deputy sheriff, by delivering to him personally a true copy of this writ with all the endorsements thereon. Sheriff fees: $1.71. Fred Sperber, sheriff, Hamilton county, Ohio. By Raymond Kies, deputy.

1940, May 14. Entry Sustaining Demurrer and Dismissing Action; Plaintiff to Pay Costs; Plaintiff Excepts.

This cause came on to be heard upon the demurrer filed by the defendant herein, and the court, being fully ad-

vised in the premises, finds that the demurrer is well taken and that the same should be and it is hereby sustained.

It is therefore ordered, adjudged and decreed that the demurrer of the defendant be sustained and the petition [fol. 17] be and it is hereby dismissed, and that the defendant go hence without day and recover from the plaintiff his costs herein. To all of which the plaintiff excepts.

1940, May 14. Entry Dissolving Temporary Restraining Order; Plaintiff Excepts.

This cause came on to be heard upon the motion of the defendant to dissolve the temporary restraining order heretofore entered by this court, and the court, being fully advised in the premises, finds that the motion to dissolve the said temporary restraining order is well taken and that the said motion should be and it is hereby granted.

It is therefore ordered, adjudged and decreed that the motion of the defendant to dissolve the temporary restraining order heretofore entered be sustained, and the said temporary restraining order is hereby dissolved. To all of which the plaintiff excepts.

1940, May 15. Order fixing bond on appeal in the sum of $250.00.

On application of the plaintiff The Baltimore & Ohio Railroad Company to fix the bond herein on the appeal on questions of law and fact the court hereby fixes the bond at two hundred and fifty dollars.

1940, May 15. Leave given to file affidavit of E. L. Williams.

1940, May 15. Affidavit of E. L. Williams filed by leave.

1940, May 15. Notice of Appeal on Questions of Law and Fact Filed.

1940, May 15. Precipe for transcript filed.

[fol. 18] 1940, May 15. Appeal Bond No. 117 on Book No. 28 in the sum of $250.00 given.

1940, May 15. Bill of exceptions filed.

1940, May 15. Waiver of notice and consent to immediate transfer filed.

1940, May 15. Bill of exceptions transmitted to Judge Ryan.

1940, May 15. Bill of exceptions received from Judge Ryan signed and allowed.

[Duly certified.]

[fol. 19] In the Court of Appeals, Hamilton County, Ohio

The Baltimore & Ohio Railroad Company, Plaintiff-Appellant,

vs.

Frederick S. Kepner, Defendant-Appellee

[No. 5843]

## Transcript of Docket and Journal Entries

1940, May 16. Transcript and original papers filed.
1940, May 16. Motion for temporary restraining order filed
1940, May 16. Affidavit of William A. Eggers filed.
1940, May 16. Bill of exceptions filed.

1940, May 20. Judgment Entry Finding Appellant Not Entitled to Relief Prayed for in its Petition and Entering Judgment in Favor of Appellee and Certifying Cause to Supreme Court as Being in Conflict, Mandate Sent to Court of Common Pleas.

This cause came on to be heard on an appeal on questions of law and fact from a judgment rendered by the Court of Common Pleas of Hamilton county, Ohio, and was submitted to the court on the evidence, pleadings and arguments of counsel. Upon consideration whereof the court finds from said pleadings and evidence that the plaintiff-[fol. 20] appellant is not entitled to the relief prayed for in its petition.

It is therefore ordered, adjudged and decreed by the court that the petition of the plaintiff-appellant be and the same hereby is dismissed and that the plaintiff-appellant go hence without day and that judgment upon the issues joined be and the same is entered in favor of the defendant-appellee at the costs of the plaintiff-appellant.

The judges of the court find that the judgment herein is in conflict with a judgment pronounced upon the same question by the Court of Appeals of the second appellant district of Ohio in the case of The Baltimore & Ohio Railroad Company v. Orris E. Inlow, No. 3111, of said court, and we do hereby certify the record of this case to the

Supreme Court for review and final determination this twentieth day of May, 1940.

To all of which counsel for plaintiff-appellant excepts.

1940, May 20. Motion for new trial filed.

1940, May 20. Entry Overruling Motion for New Trial.

This cause coming on for hearing on the motion of plaintiff-appellant to set aside the judgment entry heretofore entered herein on the seventeenth day of May, 1940, and for a new trial, upon consideration whereof said motion is overruled to which plaintiff-appellant excepts.

1940, May 20. Bill of exceptions filed.

1940, May 20. Waiver of notice and consent to immediate transmission to court filed.

1940, May 20. Bill of exceptions transmitted to Judges Hamilton, Matthews and Ross.

1940, May 20. Bill of exceptions received from Judges Matthews, Hamilton and Ross signed and allowed.

[Duly certified.]

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[fol. 21] In Court of Appeals, Hamilton County, Ohio

Motion for New Trial—Filed May 20, 1940

Now comes plaintiff-appellant, The Baltimore & Ohio Railroad Company, and moves the court to set aside the judgment entry entered herein and to grant plaintiff-appellant a new trial.

Waite, Schindel & Bayless, Herbert Shaffer, Philip J. Schneider, Attorneys for Plaintiff-Appellant.

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[fol. 22] In Court of Appeals, Hamilton County, Ohio

Bill of Exceptions—Filed May 20, 1940

Be it remembered that at the January term of the Court of Appeals of the first appellate district of Ohio, to-wit on the sixteenth day of May, 1940, before Francis M. Hamilton, presiding judge and Judge Stanley Matthews and Judge Simon Rose, this cause came on for hearing, and the following evidence was offered by the parties.

Cincinnati, Ohio, May 17, 1940.

Service of notice is hereby waived and appearance hereby entered and consent to immediate transmission,

reserving all right to question admissibility, relevancy and competency of this bill of exceptions.

Borden & Gaines, Edward M. Ballard, George Metzger, Attorneys for Appellee.

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In the Court of Common Pleas, Hamilton County, Ohio

Bill of Exceptions

Be it remembered that upon the trial of this cause at the April, A. D. 1940 term of said Court of Common Pleas, before the Honorable Dennis J. Ryan, one of the judges of said court, the following proceedings were had, to wit:

Cincinnati, Ohio, May 15, 1940.

Service of notice is hereby waived and appearance hereby entered and consent to immediate transmission, reserving [fol. 23] all rights to question the admissibility, relevancy and competency of this bill of exceptions.

Borden & Gaines, Edward M. Ballard, George Metzger.

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Affidavit of Paul C. Garrott

Paul C. Garrott of Baltimore, Maryland, being first duly sworn according to law, deposes and says that he is employed by The Baltimore & Ohio Railroad Company in the capacity of general claim agent; that in the said position he is directly engaged in the handling of litigation arising out of personal injury claims against his employer; that in addition thereto he serves in a supervisory capacity over numerous other employees of The Baltimore & Ohio Railroad Company in handling litigation against The Baltimore & Ohio Railroad Company involving personal injuries, and that he has been employed in such capacity and in the claim department of said railroad company for a total of twenty-three years; that during that entire period he has had experience in preparing cases for trial, arranging for the attendance of witnesses and handling all other matters necessary or incident to the trial of cases; that he has on numerous occasions been called upon to arrange for the attendance of witnesses and the presenting of evidence for the trial of cases at points located at a considerable distance

from the place where the accident occurred and from the residences of the witnesses necessary to present the evidence in connection with such cases; that he is familiar from [fol. 24] actual experience with the cost and expense incident to the trial of cases at points distant from the place of residence of the parties to the action and with the difficulties involved in adequately presenting all of the evidence at issue when legal process to require the attendance of witnesses is not available, and that he is familiar with the method of assignment of cases for trial in effect in the United States District Court for the Eastern District of New York.

Affiant further says that cases for trial in said United States District Court for the Eastern District of New York are assigned for trial in numerical order, by terms, and are called for trial in the order assigned, and that it is impossible to determine with any degree of exactness the date of trial of any cases at issue; that it is necessary in order to be prepared for the trial of said cases to arrange for all witnesses to be available in New York for some days prior to the probable date of trial.

This affiant further says that he has studied the claim file covering the case of Frederick S. Kepner against The Baltimore & Ohio Railroad Company and that it appears likely that there will be in excess of twenty-five (25) witnesses necessary to the proper presentation of the defense of said case and that the residences of said witnesses is Butler or Hamilton counties, Ohio, and that because of the great distance involved and the time required in getting from Butler or Hamilton counties, Ohio, to New York, it would be necessary to have all of said witnesses present in New York a number of days before the probable date of trial.

Affiant further says that The Baltimore & Ohio Railroad [fol. 25] Company would be required not only to pay for the travelling expenses in connection with the attendance of said witnesses but for the full period of time such witnesses will be away from their ordinary employment, together with hotel bills and all other expenses incident to the arranging for the attendance of said witnesses at the said trial in New York, and that the actual cost to The Baltimore & Ohio Railroad Company without considering indirect cost, will substantially exceed four thousand ($4000) dollars.

This affiant further says that it is not possible to fully anticipate all of the evidence required to adequately present

the facts to the court and jury when the trial of the litigation is located at a point a great distance from the place of residence of the witnesses either by the taking of depositions or by attempting to anticipate the witnesses required and to arrange for their attendance.

Further affiant saith not.

Paul C. Garrott.

Sworn to before me and subscribed in my presence this twenty-second day of January, 1940. Magdalene Lauer. My commission expires May 5, 1941. (Seal.)

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### Affidavit of E. L. Williams

E. L. Williams, of Cincinnati, Ohio, being first duly sworn according to law, deposes and says that he is employed by The Baltimore & Ohio Railroad Company in the capacity of general claim agent, that in said position he is directly engaged in handling litigation arising out of personal injury [fol. 26] claims against his employer; that in addition thereto he serves in a supervisory capacity over numerous other employees of The Baltimore & Ohio Railroad Company involving personal injuries; that prior to being appointed general claim agent of The Baltimore & Ohio Railroad Company he was employed by said company as claim agent and has acted as general claim agent or claim agent for a total period of forty (40) years; that during that entire period he has had experience in preparing cases for trial, arranging for the attendance of witnesses and handling of other matters necessary or incident to the trial of cases and that he has on numerous occasions been called upon to arrange for the attendance of witnesses and the presenting of evidence for the trial of cases at points located at a considerable distance from the place where the accident occurred and from the residences of the witnesses necessary to present the evidence in connection with such cases; that he is familiar from actual experience with the cost and expense incident to the trial of cases at points distant from the place of residence of the parties to the action and with the difficulties involved in adequately presenting all of the evidence at issue when legal process to require the attendance of witnesses is not available.

This affiant further says that in his capacity as general claim agent of The Baltimore & Ohio Railroad Company he has been informed that on the eighteenth day of May, 1939, the defendant in the above action, Frederick S. Kepner, was injured at East Middletown, Butler county, Ohio, [fol. 27] while employed by The Baltimore & Ohio Railroad Company as a brakeman; that at the time of the said accident Frederick S. Kepner was a resident of Hamilton county, Ohio; that thereafter the said Frederick S. Kepner has maintained his residence in Hamilton county, Ohio, and now resides at 405 Lombardy street, Elmwood Place, Hamilton county, Ohio; that the defendant, Frederick S. Kepner, has not filed any action against The Baltimore & Ohio Railroad Company in either Butler or Hamilton county or in the United States District Court, Southern District of Ohio, Western Division, but has filed suit based upon the said accident in the United States District Court for the Eastern District of New York.

This affiant further says that since the eighteenth day of May, 1939, The Baltimore & Ohio Railroad Company has at all times operated its system of railroad in and through Butler and Hamilton counties, Ohio, and at other points in the southern district of Ohio, and that at all of said places it has had available numerous agents upon whom service of process could have been had.

This affiant further says that he has made an investigation of the facts involved in the said accident of May 18, 1939 in which the defendant was injured and that all of the witnesses familiar with the facts of said accident, those who have made inspection of the premises and surrounding circumstances since the occurrence, and those who have rendered medical assistance to the said defendant and are aware of his condition, live in Butler county or Hamilton [fol. 28] county, Ohio, and have at all times been subject to legal process to require their attendance as witnesses in the Common Pleas Court of Butler county, Ohio, Hamilton county, Ohio, or in the United States District Court, Southern District of Ohio, Western Division; that during all of said period Morris S. Borden and Samuel T. Gaines who have been employed as counsel by the said Frederick S. Kepner have lived in the county of Cuyahoga, Ohio, and have practiced law in the city of Cleveland, Ohio; that the situs of the court in which this defendant has filed action is located more than seven hundred (700) miles from the

place of the residence of the witnesses and others necessary for the trial of said action.

This affiant further says that he has made an investigation of the witnesses that will be necessary to try the case so filed by the defendant against The Baltimore & Ohio Railroad Company in the United States District Court for the Eastern District of New York and that the number of witnesses necessary will be in excess of twenty-five (25), consisting of railroad employees on duty with the defendant, the railroad employees who have examined the premises since the said accident and prepared all necessary engineering and other data, those who have inspected the equipment involved, and numerous physicians, surgeons, hospital attendants and other medical experts who are familiar with the medical facts at issue; that it will be necessary to arrange for all of the said witnesses to be present in New York for the trial of said case; that The Baltimore & Ohio Railroad Company will be required not only to pay for all [fol. 29] travelling expenses in connection with the attendance of said witnesses but for the full period of time such persons will be away from their ordinary employment together with hotel bills and all other expenses incident to arranging for the attendance of such witnesses at the said trial in New York; that in the event The Baltimore & Ohio Railroad Company is unable to arrange for the attendance of such witnesses at the said trial in New York it will be necessary to take the depositions of such witnesses; that because of the great distance of the situs of the trial it will be necessary either to take the depositions or to arrange for the attendance of numerous witnesses who may not be necessary in the actual trial of the case because of the inability of those in charge of the said trial to anticipate before trial all of the evidence that may be necessary either as direct or rebuttal testimony, and that the actual cost to The Baltimore & Ohio Railroad Company, without considering indirect cost, of having said trial in New York would greatly exceed the cost of having said trial in Hamilton or Butler counties, Ohio, and will substantially exceed four thousand ($4000) dollars.

This affiant further says that it is not possible to fully anticipate all of the evidence required to adequately present the facts to the court and jury when the trial of the litigation is located at a point a great distance from the places of residence of the witnesses, either by the taking of depo-

sitions or by attempting to anticipate the witnesses re-
[fol. 30] quired and to arrange for the attendance at the trial.

Further affiant saith not.

E. L. Williams.

Sworn to before me and subscribed in my presence this twenty-fourth day of January, 1940. Edw. L. Douglass, Jr., Notary Public in and for Hamilton county, Ohio. (Seal.)

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AFFIDAVIT OF E. L. WILLIAMS

E. L. Williams, of Cincinnati, Ohio, being first duly sworn according to law, deposes and says that he is still employed by The Baltimore & Ohio Railroad Company, as originally set out in his affidavit dated January —, 1940. He further says that since the aforesaid affidavit was made, an additional investigation has been conducted under his supervision and that new facts have been developed which will be material to the defense of the case and that in order to prove the new facts from six to eight witnesses residing in Hamilton county will be necessary. None of said witnesses are employed by The Baltimore & Ohio Railroad Company and none of them would be subject to the process of the United States District Court, Eastern District of New York; that the testimony of said witnesses can not be taken by deposition as it would only be used in the event of possible developments during the trial of the case and to take their depositions would disclose the nature of the defense. He further says that none of said witnesses were included in the original affidavit and all of them in addition thereto.
[fol. 31] Affiant further says that approximately twenty of the original witnesses will have to travel a distance of over eight hundred and five miles, and the rest of the witnesses, including those mentioned in the within affidavit will have to travel over seven hundred and seventy miles to the point of trial.

Further affiant saith not.

E. L. Williams.

Sworn to before me and subscribed in my presence this fourteenth day of March, 1940. Edwin L. Douglass, Jr., Notary Public in and for Hamilton County, Ohio. (Seal.)

Thereupon the court rendered judgment as appears of record in this cause.

### Order Overruling Motion for New Trial

Thereupon, afterwards, and within three days, the plaintiff, by its counsel, filed in writing its motion to set aside said verdict and for a new trial, which motion the court overruled, to which action of the court, plaintiff, by its counsel, then and there duly excepted.

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### Order Settling Bill of Exceptions

And now comes the plaintiff, by its counsel, and tenders this, its bill of exceptions, containing all the evidence introduced on the trial of this cause, the same having been filed with the clerk of the court the fifteenth day of May, A. D. 1940, and being within forty days of the overruling of the motion for a new trial, and prays that the same be allowed, settled, signed, and ordered to be made a part of the record herein, which is accordingly done.

[fol. 32] Witness the hand of this court this fifteenth day of May, A. D. 1940.

Dennis J. Ryan, Judge, Court of Common Pleas, Hamilton County, Ohio.

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### Affidavit of Wm. A. Eggels

State of Ohio,
Hamilton County, ss:

William A. Eggers, being first duly cautioned and sworn, deposes and says that he is assistant general solicitor of The Baltimore & Ohio Railroad Company and is familiar with the above case and the proceedings had in the Court of Common Pleas in said cause. Deponent further says that he is informed and believes that the next call of the docket in the United States District Court for the Eastern District of New York will be on or about May 25, 1940, and that defendant, Frederick S. Kepner, will at that time personally or through his counsel have the case set for trial and that the date for hearing of said trial will in all probability be early in June. Deponent further says that proceeding with said trial in said cause in said eastern district of New

York would cause great and irreparable injury to plaintiff in the event that the Court of Appeals, First Appellate District of Ohio should reverse the judgment of the Court of Common Pleas of Hamilton county and hold that the appellant herein is entitled to an injunction.

Further deponent saith not.

William A. Eggers.

Sworn to before me and subscribed in my presence this fifteenth day of May, 1940. Ralph M. Buzek, Notary Public in and for Hamilton County, Ohio. (Seal.)

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[fol. 33] The above and foregoing was all the evidence offered by the parties or either of them upon the trial of this cause.

Upon consideration whereof, the court found the equities to be in favor of the appellee, Frederick S. Kepner, as appears of record herein.

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### Order Overruling Motion for New Trial

Whereupon and afterward and within three days appellant, The Baltimore & Ohio Railroad Company, filed a motion for a new trial, which, after consideration, the court overruled.

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### Order Settling Bill of Exceptions

And now comes appellant, The Baltimore & Ohio Railroad Company and tenders this its bill of exceptions, the same having been filed with the clerk of courts within one day after the overruling of the motion for a new trial, and prays that the same be allowed, signed and made part of the record herein, which is accordingly done.

Witness, the hand of the court on this twentieth day of May, A. D. 1940.

Francis M. Hamilton, Judge; Stanley Matthews, Judge; Simon Ross, Judge.

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Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 34] Opinion of the Supreme Court of Ohio

The Baltimore & Ohio Rd. Co., Appellant,

v.

Kepner, Appellee

Injunction—State Courts Cannot Enjoin Bringing Action in Federal Court in Another State—Federal Employers' Liability Act

The state courts of this state cannot, in the exercise of their equity powers, enjoin a resident of the state from prosecuting a cause of action, arising under the Federal Employers' Liability Act, in a federal court of another state having jurisdiction of such action, even though such cause of action arose and may be prosecuted in this state, and even though its prosecution in the federal court of another state may cause great inconvenience and expense to the defendant.

No. 28205. Decided December 18, 1940

Certified by the Court of Appeals of Hamilton County

On rehearing.

On May 18, 1939, Frederick S. Kepner sustained personal injuries at East Middletown, Butler county, Ohio, while engaged in the performance of his duties as a brakeman in interstate commerce for The Baltimore & Ohio Railroad Company. Kepner is now, and was at the time of his injury, a resident of Hamilton county, Ohio. To recover damages for such injury, he instituted an action against the railroad [fol. 35] company under the Federal Employers' Liability Act in the United States District Court for the Eastern District of New York, in which district the railroad company was doing business at the time such action was commenced.

After Kepner's suit had been instituted, plaintiff in this action, The Baltimore & Ohio Railroad Company, brought this suit against Kepner, as defendant, in the Common Pleas Court of Hamilton county, to enjoin him from further prosecuting his personal injury suit in the federal court for the Eastern District of New York. The plaintiff in its petition, in addition to stating the above facts, alleges that it has at all times, since the accident to the defendant, operated a part of its railroad system through Hamilton and

Butler counties in the state of Ohio where the Common Pleas Court's of these counties and the United States District Court for the Southern District of Ohio, Western Division, have jurisdiction to hear and decide defendant's alleged cause of action; that Kepner in bringing his action against the railroad company, more than 700 miles distant from his residence and place of his accident, will cause great inconvenience and unwarranted expense to the plaintiff in that it will be obliged to transport not less than 25 witnesses from the vicinity of Kepner's accident to the place of trial and to keep these witnesses there before and during the trial for several days at an increased expense of not less than $4,000; and that the prosecution of that action in the New York federal court will constitute an undue burden on interstate commerce, and will be an unreasonable, improper and inequitable burden on the company, with no benefit to Kepner.

The defendant demurred to the petition on the grounds that it did not state facts showing a cause of action and that the court had no jurisdiction of the subject of action, which demurrer was sustained. The plaintiff electing not to plead further, the court entered judgment for the defendant and [fol. 36] dismissed the petition. Thereupon, plaintiff appealed to the Court of Appeals of Hamilton county on questions of law and fact, which court entered a decree for the defendant but certified its record to this court for review and final determination on the ground that its judgment in this case is in conflict with that of the Court of Appeals of Franklin county in the case of Baltimore & Ohio Rd. Co. v. Inlow, unreported.

Messrs. Waite, Schindel & Bayless, Mr. Herbert Shaffer and Mr. Philip J. Schneider, for appellant.

Messrs. Borden & Gaines, Mr. Edward M. Ballard and Mr. George Metzger, for appellee.

Hart, J.:

The question presented in this case is: May a state court of equity restrain a railroad company's employee, injured in the course of his employment in the state of his residence while engaged in interstate commerce, from prosecuting a cause of action for such injury against his employer under the Federal Employers' Liability Act in a federal District Court of a foreign state, in which district the railroad com-

pany was doing business at the time the action was commenced, on the ground that such action thus instituted would cause the railroad company unnecessary inconvenience and expense in the trial of such action?

The defendant's demurrer admits all well-pleaded facts including allegations to the effect that defendant's prosecution of his action against the railroad company in the District Court of New York, more than 700 miles from his residence and the place of his accident, will inconvenience and harass the railroad company, and will subject it to unnecessary expense. We may, therefore, assume that the equities shown by the petition favor the contention of the plaintiff, and it remains only to be determined whether the petition is otherwise sufficient to state a cause of action. Defendant [fol. 37] Kepner predicates his demurrer to the petition on the provisions of Title 45, Section 56, U. S. Code, which is in part as follows:

"Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action."

The plaintiff claims that notwithstanding the right of an employee under the statute to prosecute his claim for damages in a district in which the employer is doing business at the time of commencing such action, the state courts of the state of the employee's residence have jurisdiction over him to control him in person and prevent him from invoking the jurisdiction of such district court in a foreign state, if it is inequitable to the employer for him to do so. The plaintiff, to sustain its position, relies in large measure on the recent decision of this court in the case of New York, Chicago & St. Louis Rd. Co. v. Matzinger, 136 Ohio St., 271, 25 N. E. (2d), 349, wherein this court affirmed a judgment of the Court of Appeals holding that the plaintiff below could be enjoined from prosecuting in the state of Illinois her claim for damages for personal injuries suffered in an accident at the hands of the railroad company in this state, where to prosecute such an action would be unduly harassing or oppressive to the defendant. The jurisdiction of the court of this state to make such an order under proper circumstances was approved on the ground

that the person on whom the restraining order is made resides within the jurisdiction and is within the power of the court issuing it. In that case this court said: "The jurisdiction rests in the authority vested in courts of equity over persons * * * not in contravention of any right given by the Constitution or laws of the United States."

This court further pointed out that the question involved in the Matzinger case, above referred to, was one of venue [fol. 38] rather than jurisdiction; that jurisdiction connotes the power to hear and decide a case on the merits while venue connotes locality, the place where a suit should be heard; and that both jurisdiction and venue are prescribed by constitutional or statutory provisions. This court still fully adheres to the doctrine announced in that case when applied to a similar state of facts. However, this court is of opinion that the doctrine of the Matzinger case does not apply to the case at bar.

In the Matzinger case, the plaintiff had no specially granted or inherent right to invoke the jurisdiction of the Illinois court except as she, herself, chose to go into the court of that state and on her own motion invoke its jurisdiction by filing her petition therein. There was no law in Ohio, the jurisdiction of her residence, which granted her that right. If there could have been and had been such a law, valid within the state of Ohio, it would seem apparent that no Ohio court could take that right away by injunction operating upon her person.

While in Ohio, certain actions may be brought only in the county in which the defendant resides or may be summoned (Section 11277, General Code), yet under Section 6308, General Code, actions for injury to person or property caused by the negligence of the owner or operator of a motor vehicle may be brought by the person injured against such owner or operator in the county wherein such injuries occur, even though either the plaintiff or defendant, or both, may reside in *in* the most distant part of the state from the place of accident, and even though the prosecution of such action in the county where the injury occurred will result in great inconvenience and added expense to the defendant. This right to prosecute an action in the county where injuries occurred is one specially granted by statute. This court has held that the adoption of a similar statute, giving the party injured in an automobile accident the right [fol. 39] to bring his action in the county in which he re-

sides, was not only a constitutional exercise of legislative power (Allen v. Smith, 84 Ohio St., 283, 93 N. E. 829, Ann. Cas. 1912C, 611) but that such statute, being remedial in character, must be liberally construed. Gorey v. Black, 109 Ohio St., 73, 79, 125 N. E., 126. In the former case above cited, Judge Spear, speaking for the court (page 290), said:

"Whether or not this power is always wisely exercise; whether it always brings perfectly fair results, and whether such legislation is entirely reasonable, it is not important for us to inquire; once the power to legislate on the subject and determine the venue of actions is found to exist in the General Assembly, the wisdom of its exercise is not a judicial question."

The federal statute now under consideration specifically grants to defendant Kepner a right to bring an action to recover for his injuries, as he did do, in the federal District Court where the plaintiff in this action is doing business. This statute being federal and nationwide in its application, operates in the place of his residence. It is not necessary for him to go into a foreign state, so far as jurisdiction is concerned, to invoke its operation in his case. It becomes a substantial part of his right of action.

This right did not come by accident but by design, so far as the Congress of the United States is concerned. The history of the Federal Employers' Liability Act shows that it has been the intent of Congress to enlarge, from time to time, the rights and privileges of the employee under this act. When first enacted in 1906 (34 Stats. at L., 232), the act did not contain any designation of the courts in which actions under it might be brought and did not attempt to establish any venue. The original act was declared unconstitutional (Employers' Liability Cases, 207 U. S., 463, 52 L. Ed., 297, 28 S. Ct. 141), but a similar act was again passed in 1908 (35 Stats. at L., 65). While both the original [fol. 40] and the newer act provided that an employee should not be barred recovery because of his contributory negligence, but that damages should be diminished in proportion to the amount of his contributory negligence, the latter act provided that the employee injured or killed by accident and guilty of contributory negligence should not be held to be negligent, and did not assume the risk where the common carrier had violated the Safety Appliance Act. The statute of limitations was extended from one year to two years.

Under the latter act, no provision was made as to jurisdiction or venue and the employee was obliged to bring his action in the state courts unless there was diversity of citizenship or some other fact which gave the federal courts jurisdiction under the Federal Code. Cases instituted in the state courts were then removable to the federal courts on the grounds provided in the Federal Code.

However, when the statute was amended in 1910 (36 Stats. at L. 291) the act was still further liberalized in favor of the employee. For the first time the venue of actions under the act was specifically provided to the effect that an action "may be brought in the Circuit Courts of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action." The jurisdiction of the courts of the United States under this amendment was made concurrent with that of the several states, and no case arising under the amended act brought in a state court could be removed to any court of the United States. In 1911, when the Circuit Courts were abolished, their jurisdiction was transferred to the District Courts of the United States. By an amendment of the act in 1939 (53 Stats. at L., —), a three-year limitation was provided.

It is obvious that when Congress amended the act in 1910 [fol. 41] and thereby provided that an employee plaintiff might bring his action in the district of the residence of a defendant, or in which the cause of action arose, or in which a defendant was doing business at the time of commencing such action, it gave him, and intended to give him, his free choice to bring his action in any one of the three possible locations mentioned in the statute, and gave him this right with full knowledge that it would permit him, under the permissive circumstances named in the statute, to bring his action in courts far distant from the place where his cause of action arose. Under these circumstances, should a state court interfere with the exercise of a right thus granted to the injured employee? The majority of this court thinks not.

By the weight of authority, a state court may enjoin one of its residents from prosecuting a case arising under the Federal Employers' Liability Act, in a state court of another state, but may not enjoin such resident from prosecuting an action under the Federal Employers' Liability Act in the federal courts of another state, assuming that

such federal court has jurisdiction under the act. The basis for this distinction lies in the fact that in the one case the court is enjoining a privilege which an employee cannot demand; while in the other, the court is attempting to enjoin the exercise of a right which an employee is privileged, under the Federal Employers' Liability Act, to enjoy.

To illustrate, Congress may give permissive jurisdiction to the state courts to hear and decide cases arising under a federal act, but cannot compel a state court to accept such jurisdiction. That a state has the power to limit the exercise of such jurisdiction by its courts is demonstrated by the legislative enactment and judicial interpretation of Section 11273, General Code, which excludes from the jurisdiction of the state courts of Ohio all causes, including causes of action arising under the Federal Employers' Liability [fol. 42] Act against railroad companies for injuries occurring without the state of Ohio, unless the claimant is a resident of this state or unless the injury complained of resulted from the joint negligence of such railroad company and another defendant properly joined as defendants in an action properly brought against the latter defendant in a county of this state in which venue is authorized by such statute. Loftus v. Pennsylvania Rd. Co., 107 Ohio St., 352, 140 N. E., 94; Baltimore & Ohio Rd. Co. v. Baillie, 112 Ohio St., 567, 148 N. E., 233; Reeves v. Louisville & Nashville Rd. Co., 124 Ohio St., 657, 181 N. E., 885 (appeal dismissed by United States Supreme Court for want of a substantial federal question, Reeves v. Louisville & Nashville Rd. Co., 285 U. S., 524, 76 L. Ed., 922, 52 S. Ct., 314). By the same token, Congress cannot give a resident of Ohio an absolute right to prosecute in a state court of New York a cause of action arising in Ohio under a federal act; nor can the state court of New York be required to accept jurisdiction of a suit to enforce such cause of action. Robertson v. Baldwin, 165 U. S., 275, 41 L. Ed., 715, 17 S. Ct., 326; Douglas v. New York, New Haven & Hartford Rd. Co., 279 U. S., 377, 387, 73 L. Ed., 747, 49 S. Ct., 355; Chambers v. Baltimore & Ohio Rd. Co., 207 U. S., 142, 52 L. Ed., 143, 28 S. Ct., 34; Ex parte Crandall, 52 F. (2d), 650, 654; Walton v. Pryor, 276 Ill., 563, 115 N. E., 2, L. R. A. 1918E, 1914.

When, therefore, an Ohio court enjoins a resident of the state from prosecuting his suit in the courts of another state, it is not restraining such citizen from the exercise of a right specially granted or interfering with the exercise

of any duty or obligation on the part of such foreign state court to take jurisdiction of an action arising outside of that state. When an Ohio court thus enjoins a resident of the state, it does not deprive him of a legal right which is effective in Ohio and assertable by him as a resident of Ohio. On the other hand, Congress has, under the Federal Em-[fol. 43] ployers' Liability Act, conferred upon all citizens of the United States, including those of Ohio, the specific right to prosecute a cause of action under such act in a District Court of the United States in a district in which the employer may be doing business at the time of commencing such action, and has imposed upon such District Courts the duty of exercising such jurisdiction, when invoked. If, therefore, a court of the state of Ohio, as in this case, should enjoin an employee from prosecuting his action arising in Ohio under the Federal Employers' Liability Act, in the District Court of New York, within which an employer, corresponding to the plaintiff in this case, is doing business, the result would be to destroy a federal right of the employee and to obstruct the performance of a duty imposed by act of Congress upon the federal court of New York. The law does not warrant such interference.

The distinction here pointed out is well illustrated by the holdings of the Supreme Court of Indiana. In the case of Kern v. Cleveland, Cincinnati, Chicago & St. Louis Ry. Co., 204 Ind., 595, 185 N. E., 446, decided in 1933, the court held that a resident of Indiana was properly enjoined from bringing an action against a railway company under the Federal Employers' Liability Act in a state court of Missouri when such action arose in Indiana, and when the trial in Missouri would be burdensome and expensive to the defendant and an interference with interstate commerce. Other authorities supporting this rule are: State, ex rel. New York, Chicago & St. Louis Rd. Co., v. Nortoni, Judge, 331 Mo., 764, 55 S. W. (2d), 272, 85 A. L. R., 1345, and annotation; Reed's Admx. v. Illinois Central Rd. Co., 182 Ky., 455, 206 S. W., 794; Chicago, Milwaukee & St. Paul Ry. Co. v. McGinley, 175 Wis., 565, 185 N. W., 218.

But in the case of McConnell v. Thomson, 213 Ind., 16, 8 N. E. (2d) 986, decided in 1937, the Supreme Court of Indiana held that a state court cannot limit a United States [fol. 44] citizen's exercise of a right conferred by a valid act of Congress, since the state itself, in the exercise of full sovereign power, cannot limit or abridge such right; and

that an Indiana court of equity, therefore, had no power to enjoin an Indiana resident from prosecuting an action in a federal court of the state of Missouri under the Federal Employers' Liability Act, since such injunction would destroy the federal right of a litigant and obstruct the federal court in the performance of its duty.

The doctrine of the last above-mentioned case seems to be supported by the overwhelming weight of authority to the effect that the jurisdiction of the federal courts to determine causes arising under the Federal Employers' Liability Act cannot be enjoined or interferred with by a state, or by state or other courts. 28 American Jurisprudence, 400, Section 217; Hoffman, Judge, v. Missouri, ex rel. Foraker, 274 U. S., 21, 71 L. Ed., 905, 47 S. Ct., 485; Connelly v. Central Rd. Co. of New Jersey, 238 F., 932, 933; Trapp v. Baltimore & Ohio Rd. Co., 283 F., 655; Chicago, M. & St. Paul Ry. Co. v. Schendel, 292 F., 326, 329; Norris v. Illinois Rd. Co., 18 F. (2d), 584; Southern Rx. Co. v. Cochran, Judge (C. C. A. 6), 56 F. (2d), 1019; Wood v. Delaware & Hudson Rd. Co., 63 F. (2d), 235; Chesapeake & Ohio Ry. Co. v. Vigor (C. C. A. 6), 90 F. (2d), 7.

In the last case above cited, a suit originating in the District Court of the United States for the Southern District of Ohio, the court denied the railroad company an injunction to enjoin the administratrix of an employee of the railroad company who resided at Columbus, Ohio, and who was killed at Marion, Ohio, from prosecuting her action under the Federal Employers' Liability Act in the United States District Court for the Northern District of Indiana at Hammond, Indiana, on the claimed ground that the prosecution of the suit in Indiana would give the plaintiff in that suit an unfair advantage and would cause the railroad com- [fol. 45] pany unreasonable hardship. The Circuit Court of Appeals for the Sixth Circuit, in affirming the judgment of the District Court, said:

"Plaintiff was doing business in the Northern District of Indiana at the time the action in that court was filed, and there is no doubt of the right of the defendant under the statute to file her suit in that jurisdiction. * * * The plaintiff, it is true, may suffer some inconvenience or be put to extra expense in producing witnesses to testify in court in the Indiana case, but it is to be presumed that Congress considered such probable inconvenience and expense in plac-

ing jurisdiction of the action in any district in which the defendant should be doing business at the time. We held in Southern Railway Company v. Cochran, 56 F. (2d), 1019, that the filing of a suit in such a jurisdiction, even though it was inconvenient to the defendant, was not enough to justify a court of equity in enjoining its prosecution in the face of the statute giving the right to bring the action in that jurisdiction. This ruling is consonant with established authority, and it is controlling in the case at bar." The United States Supreme Court denied certiorari in that case on October 11, 1937 (C. & O. Ry. Co. v. Vigor, 302 U. S., 705, 82 L. Ed., 545).

The plaintiff in this case places great reliance upon the case of Bryant v. Atlantic Coast Line Rd. Co., 92 F. (2d), 569, as supporting its contention, but this court does not view it as a controlling authority. In that case, the plaintiff, a resident of Virginia, employed by the defendant engaged in interstate commerce was injured in his employment in Virginia. He sued the defendant railroad company in the United States District Court for the Southern District of New York under the Federal Employers' Liability Act. The defendant appeared specially and moved to dismiss the action on the ground that it was a burden upon interstate commerce to require defendant to try the cause in New York instead of Virginia, where plaintiff lived, the accident [fol. 46] happened and the witnesses were available. The motion was denied and the defendant answered. Thereafter, the defendant railroad company filed a suit in equity in a state court of Virginia to enjoin the plaintiff from prosecuting his action in New York on the ground that it was oppressive and that the proper forum was in Virginia. The Virginia court enjoined the plaintiff from proceeding in the New York federal court. Thereupon, the plaintiff moved in the District Court in New York for an order enjoining the defendant from taking any steps to enforce the Virginia state court injunction or to prosecute the suit. The motion was denied and plaintiff appealed.

The Circuit Court of Appeals did not put any stamp of approval upon the right of the state court of Virginia to enjoin the plaintiff from prosecuting his action in the federal court, but held that the District Court was right in not issuing a counter injunction against the defendant in prosecuting its injunction suit in Virginia; that federal courts will enjoin state courts where a suit has been first begun in

a federal court and it has assumed custody of a res, as in case of property in a bankruptcy estate, or other property in control of the federal court; and that a federal court may enjoin under circumstances where, unless the state suit is enjoined, the plaintiff in the federal suit will permanently lose a defense which cannot be set up in the state suit. Otherwise, federal courts will not interfere with the jurisdiction of state courts. The court then significantly suggested that the plaintiff in the federal suit, defendant in the Virginia suit, might seek relief in the latter case "by appeal to the Supreme Court of Virginia and by *certiorari* to the Supreme Court of the United States." The court finally suggests that plaintiff's motion for injunction to prevent the defendant from enforcing the Virginia decree "strove to supersede that suit by drawing the same issue before the federal court." The court says: "Both controversies were [fol. 47] suits *in personam* which did not concern a *res* susceptible of custody. Both may therefore go along side by side."

It is interesting to note that the opinion in the last above-mentioned case was written by Judge Learned Hand, who joined with the other members of the same court in the decision by that court of the case of Wood v. Delaware & Hudson Rd. Co., supra.

The judgment of the Court of Appeals is affirmed.

Judgment affirmed.

Day, Zimmerman, Turner, Williams and Matthias, concur.

Weygandt, C. J., dissents.

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[fol. 48] Supreme Court of the State of Ohio of the Term of January, A. D. 1941

State of Ohio,
City of Columbus:

I, H. L. Connett, Assistant Reporter of the Supreme Court of Ohio, do hereby certify that the foregoing printed transcript consisting of fourteen (14) pages, constitutes a full, true and correct copy of the opinion of the Supreme Court of Ohio in the case of The Baltimore & Ohio Rd. Co., Appellant, v. Kepner, Appellee, as the same appears on file and of record in this office, as of the date of this certificate.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said Supreme Court this second day of January, A. D., 1941.

H. L. Connett, Assistant Reporter. (Seal.)

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[fol. 49] Transcript of Docket and Journal Entries in the Supreme Court of the State of Ohio

No. 28205

Title: The Baltimore and Ohio Railroad Company, Plaintiff and appellant, vs. Frederick S. Kepner, Defendant and appellee.

Action: Record certified for review and final determination by the Court of Appeals of Hamilton County.

Counsel: For appellant, Waite, Schindel & Bayless, Herbert Shaffer, Philip J. Schneider, Union Central Life Building, Cincinnati, Ohio. For appellee, George Metzger, 715 Gwynne Building, Cincinnati, Ohio; Borden & Gaines, National City Bank Building, Cleveland; Edward M. Ballard, 715 Gwynne Building, Cincinnati; Paul R. Brown, 139 N. Clark St., Chicago, Illinois.

Memoranda of Pleadings, etc., Filed, Writs Issued, Judgments, Orders and Decrees

May 21, 1940. Court of Appeals Transcript, Original Papers and Bill of Exceptions filed.

May 21, 1940. Cause docketed on certificate of conflict.

May 22, 1940. Papers taken by Rodenfels.

May 23, 1940. Appellants printed brief filed. 5/24/40 P. S. filed.

May 23, 1940. Printed record (12) filed. 5/24/40 P. S. filed.

May 23, 1940. Motion by appellant for a temporary restraining order and proof of service filed, and affidavits of William A. Eggers and Philip J. Schneider filed.

May 24, 1940. Affidavit of Samuel T. Gaines (1) filed.

May 24, 1940. Entry granting temporary restraining order; bond fixed at $5,000. Carl V. Weygandt, C. J. Journal 36, page 34.

May 24, 1940. Bond in sum of $5,000 B. & O. Railroad as principal, and U. S. F. & G. as surety, approved and filed.

May 28, 1940. Entry granting temporary restraining order served on defendant by Sheriff of Hamilton County, Return as follows: "Served the within named defendant, Frederick S. Kepner, by and through Wm. Brownfield, my duly authorized and acting Deputy Sheriff, by delivering to him personally a true and correct copy of this writ, with all the endorsements thereon, at 7 P. M. 5/25/40. Fred Sperber, Sheriff, by Raymond Kies, Deputy." Sheriff's fees $3.63.

May 31, 1940. Appellee's printed brief filed. 6/3/40 P. S. filed.

June 5, 1940. Reply brief of appellant filed. 6/7/40 P. S. filed.

June 18, 1940. Printer's receipted bill filed.

[fol. 50] July 10, 1940. Judgment affirmed. Journal 36, page 81.

July 16, 1940. Application for rehearing filed.

July 17, 1940. Brief in opposition to application for rehearing filed.

July 19, 1940. Memorandum of appellant on rehearing filed.

Oct. 2, 1940. Rehearing allowed. Journal 36, page 122.

Oct. 25, 1940. Printed revised reply brief of appellant filed.

November 12, 1940. Appellee's printed supplemental brief filed. 11/19/40 P. S. Filed.

Nov. 15, 1940. Appellant's printed reply brief filed. 11/18/40 Proof of service filed.

Dec. 18, 1940. Judgment affirmed. Journal 36, page 180.

Dec. 20, 1940. Entry granting temporary stay and injunction on condition that appellant file his petition for writ of certiorari within 20 days and upon giving bond in the sum of $5,000 to approval of Clerk of this Court. Carl V. Weygandt, C. J. Journal 36, page 182.

Dec. 20, 1940. Application of appellant for stay and injunction filed.

Dec. 20, 1940. Bond in sum of $5,000 U. S. Fidelity & Guaranty Co., surety approved and filed.

Dec. 24, 1940. Proof of service of order granting temporary restraining order filed. Sheriff's fees, Cuyahoga County, $2.99.

Dec. 24, 1940. Application for rehearing filed. 12/26/40 P. S. filed.

Dec. 31, 1940. Rehearing denied. Journal 36, page 194.

Journal Entries

Friday, May 24, 1940. Entry Granting Temporary Restraining Order. This day this cause came on to be heard on the application of the plaintiff, The Baltimore & Ohio Railroad Company, to grant a temporary injunction enjoining and restraining the defendant, Frederick S. Kepner, from further prosecuting his cause of action against the Baltimore & Ohio Railroad Company in the United States District Court for the Eastern District of New York, and from commencing and prosecuting any other action in said court or in any court of said state or at any other distant point against said The Baltimore & Ohio Railroad Company which is or shall be based upon the cause of action referred to in the petition in this cause, and the evidence and arguments of counsel, and was submitted to the Court. Upon consideration whereof the court finds that in view of the great importance of the subject matter involved and the seeming conflict of the authorities on the questions involved, a temporary restraining order should be issued in accordance with the prayer of the petition in order that the matters in controversy be held in status quo until the issues be presented in the pleadings so that this cause be fully heard on its merits. Wherefore, it is considered, ordered and decreed that the application for temporary restraining order as prayed for in the petition be and the same is hereby [fol. 51] granted, and upon the plaintiff giving an undertaking according to law in the sum hereinafter to be fixed by the Court, the defendant, Frederick S. Kepner, is temporarily enjoined and restrained from further prosecuting his cause of action against The Baltimore & Ohio Railroad Company in the United States District Court for the Eastern District of New York, and from commencing and prosecuting any other action in said court or in any court of said State or at any other distant point against said The Baltimore & Ohio Railroad Company which is or shall be based upon the cause of action referred to in the petition in this cause praying for said injunction. It is further considered, ordered and decreed that The Baltimore & Ohio Railroad Company, plaintiff herein, be and it hereby is ordered to furnish good and sufficient bond to the approval of the Clerk in the sum of $5000.00. To all of which defendant excepts. Carl V. Weygand, Chief Justice of the Supreme Court. Journal 36, page 34.

Wednesday, July 10, 1940. Record certified for review and final determination by the Court of Appeals of Hamilton County. This cause came on to be heard upon the transcript of the record of the Court of Appeals of Hamilton County, and was argued by counsel. On consideration whereof, it appearing that the judges of the Court are equally divided in opinion as to the merits of this case (the Court now being constituted of six judges) and are for that reason unable to agree upon a judgment and the entry of that fact constituting an affirmance of the judgment of the Court of Appeals, it is ordered that said judgment be affirmed. It is further ordered that the appellee recover from the appellant his costs herein expended taxed at $—. Ordered, That a special mandate be sent to the Court of Appeals of Hamilton County, to carry this judgment into execution. Journal 36, page 81.

Wednesday, October 2, 1940. Rehearing docket. Upon consideration of the application for rehearing, it is ordered by the Court that rehearing be, and the same hereby is, allowed. Journal 36, page 122.

Wednesday, December 18, 1940. Record Certified for Review and Final determination by the Court of Appeals of Hamilton County. This cause came on to be heard upon the transcript of the record of the Court of Appeals of Hamilton County, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this Court, that the judgment of the said Court of Appeals be, and the same is hereby, affirmed; and the temporary restraining order be dissolved; and it appearing to the Court that there were reasonable grounds for this proceeding it is ordered that no penalty be assessed herein. It is further ordered that the appellee recover from the appellant his costs herein expended taxed at $—. Ordered, That a special mandate be sent to the court of Appeals of Hamilton County, to carry this judgment into execution. Journal 36, page 180.

Friday, December 20, 1940. Entry granting temporary stay and injunction. This day this cause came on to be heard on the motion of the plaintiff-appellant, The Baltimore and Ohio Railroad Company, to grant a temporary stay and injunction enjoining and restraining the defendant-appellee, Frederick S. Kepner, from further prosecuting his cause of action against The Baltimore and Ohio Railroad Company in the United States District Court for

the Eastern District of New York until the petition of The Baltimore and Ohio Railroad Company for a writ of certiorari to this court may be determined, and the evidence and argument of counsel, and was submitted to the Court. Upon consideration whereof the Court finds that The Baltimore and Ohio Railroad Company proposes forthwith to file its petition for a writ of certiorari with the Supreme Court of the United States, and that the defendant-appellee has caused his suit to be on the trial docket for trial and threatens to proceed forthwith in the trial of this suit now pending in the United States District Court for the Eastern District of New York, and that it would be contrary to the best interests of justice and equity if the trial of said cause in the Federal Court is heard prior to the determination by the Supreme Court of the United States of the proposed petition for a writ of certiorari, and that further proceedings herein should be stayed, and the effective date of the finding of this Court postponed, and that the defendant-appellee, Frederick S. Kepner, be enjoined from proceeding with said suit in the United States District Court for [fol. 52] the Eastern District of New York, on condition that said The Baltimore and Ohio Railroad Company file it's petition for a writ of certiorari within 20 days hereof, and that the matter be pursued in the Supreme Court of the United States in accordance with the rules of said Court, and that the stay herein granted await the outcome of said proceedings, And provided further, that The Baltimore and Ohio Railroad Company furnish good and sufficient bond, to the approval of the Clerk of this Court, in the sum of Five Thousand Dollars ($5000.00), conditioned upon the filing of a petition for writ of certiorari on the terms and conditions set forth above. Carl V. Weygandt, Chief Justice of the Supreme Court. Journal 36, page 182.

Tuesday, December 31, 1940. Rehearing docket. Upon consideration of the application for rehearing, it is ordered by the Court that rehearing be, and the same hereby is, denied. Journal 36, page 194.

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State of Ohio,
City of Columbus, ss:

I, Seba H. Miller, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing trans-

cript of docket and journal entries of the Supreme Court of Ohio is truly taken and correctly copied *copied* from the records of the said Supreme Court of Ohio in the within entitled cause.

Witness my hand and the seal of the Supreme Court of Ohio, affixed at Columbus, this 2nd day of January, A. D. 1941.

Seba H. Miller, Clerk of the Supreme Court of Ohio.
(Seal.)

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[fol. 53] Supreme Court of the United States

Order Allowing Certiorari—Filed February 10, 1941

The petition herein for a writ of certiorari to the Supreme Court of the State of Ohio is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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Endorsed on Cover: File No. 45,927. Ohio Supreme Court. Term No. 678. The Baltimore and Ohio Railroad Company, Petitioner, vs. Frederick S. Kepner. Petition for a writ of certiorari and exhibit thereto. Filed January 6, 1941. Term No. 678, O. T., 1940.